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IN THE

Supreme Court of the United States

October Term, 1958.

No. 147.

IRENE HILL, Administratrix of the Estate of BENJAMIN HILL, Deceased,

Petitioner,

v.

WATERMAN STEAMSHIP CORPORATION,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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In attempting to support the contention that no conflict exists between the decision below and those of this court, respondent quotes language from *Garrett v. Moore-McCormack Company*, 317 U. S. 239, 245, 87 L. Ed. 239, 243, and *Western Fuel Co. v. Garcia*, 257 U. S. 233, 242, 66 L. Ed. 210, 214.

The Garrett case, following the principle of *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, specified clearly that a state rule cannot affect or limit the substance of a maritime right or cause of action or, to otherwise express it, it may not act in derogation of rights arising upon the commission of a maritime tort. 317 U. S. at 243-4, 87 L. Ed. at 242-3. This court there declared "the necessary dominance of admiralty principles in actions in vindication of rights arising from admiralty law." (U. S. at 244-5, L. Ed. at 243) Just as, in Garrett, the imposition upon a maritime right of a burden of proof prescribed by state law was held to affect the very substance

of the claim, so, here, would the injection of the state bar of contributory negligence deprive petitioner of the substance of her right which arose by reason of a maritime tort or default. This court said, in *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, 409, 98 L. Ed. 143, 151, that *the right of recovery is for the unseaworthiness or negligence*, which are rooted in the federal maritime law. It is solely to this right that Garrett adverts, and not to the *remedy*, state-created or otherwise. The source from which the remedy is drawn merely defines it, but prescribes nothing as to its operation in the field to which it is transferred. When borrowed by the maritime law, it becomes a part of it. *The Arizona v. Anelich*, 298 U. S. 110, 119, 80 L. Ed. 1075, 1079. Thus, in the *J. E. Rumbell*, 148 U. S. 1, 37 L. Ed. 345, this court applied a *state* lien statute in a *maritime* cause of action, in a manner wholly incompatible with the *state* law, and solely according to *maritime* principles.

The situations cited by respondent involving death caused by a maritime tort, where the limitation period specified in the state death act was given effect[1] are inapplicable in the present situation. For, in such cases of "built-in" limitations, the power to sue at all is given for the specified period, and ceases to exist at the expiration of that time. The expressed condition included within the statute itself must be recognized in its application. The application of the state bar of contributory negligence in a maritime death action does not follow therefrom. The contributory negligence bar is not a part of the Pennsylvania death statute, nor does this rule of the common law, as enforced by Pennsylvania courts, have any special application to death actions.

Respondent admits that a clear conflict exists upon the important question here involved, between the First and Second and the Third Circuits. This conflict is, itself,

1. *Western Fuel Co. v. Garcia*, 257 U. S. 233, 66 L. Ed. 210; *The Harrisburg*, 119 U. S. 213, 30 L. Ed. 362.

proper and sufficient basis for the review requested by petitioner.

Of course, respondent joins the Third Circuit in disagreeing with the two other circuits, as to the meaning of the decisions of this court, and the source of the rights arising out of maritime negligence and unseaworthiness. Respondent argues that the *O'Leary*[2] and *Halecki*[3] decisions interpret Hawn in a manner not intended by this court; and that the right enforced in an action for wrongful death has a different source from that in a personal injury action. But, this court emphasized, in Hawn, that the right of recovery in a maritime cause is "for unseaworthiness and negligence (which) is rooted in federal maritime law." (346 U. S. at 408-9, 98 L. Ed. at 150-1.) This remains the source of the action, irrespective of how serious the result, and continues to be the sole measure of liability.

Further, this court has recognized that a provision for suit beyond death is a purely remedial concept, that of "survivorship of action". *Cox v. Roth*, 348 U. S. 207, 99 L. Ed. 260; *Just v. Chambers*, 312 U. S. 383, 85 L. Ed. 903.[4] Indeed, to state that in the cases in which this court has applied a state death statute, more than a state remedy was adopted, would ignore the declaration of this court in *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 383-4, 62 L. Ed. 1171, 1176, which made it clear that this court, in such cases, is only adopting a state-created *remedy* to enforce a *right sanctioned by the maritime law.* This is the power given to the court by the Judiciary Act of

2. *O'Leary v. U. S. Lines* (1 Cir.), 215 F. 2d 708 (cert. den. 348 U. S. 939, 99 L. Ed. 735).

3. *Halecki, Admx. v. United N. Y. & N. J. S. H. P. Assn.*, (2 Cir.) 251 F. 2d 708 (cert. granted, 6/9/58, U. S. 2 L. Ed. 2d 1154).

4. Similarly, as discussed *infra*, the Pennsylvania Constitution, Art. 3, Sec. 21, limits the authority of the Pennsylvania legislature to provide only for *survival* of right of action after death. Pa. Stat. Ann., Constitution.

1789, Sec. 9, and the Judicial Code, 28 U. S. C. A. 1333, which saves to suitors, only common law *remedies* for their application.

A clear conflict exists between the decisions of the court below and those of this court. Concededly, the court below is in categorical disagreement with the First and Second Circuits. This court has granted certiorari in the Halecki case, where the present issue is among those to be reviewed. In the interest of justice, certiorari should be granted in the instant case, so that judgment herein may be reversed in accordance with the law as expressed by this court.

Despite the fact that Pennsylvania has disavowed the creation of a new cause of action by its wrongful death act, the court below has nevertheless decided to the contrary. In attempting to justify this conclusion, respondent has cited some Pennsylvania decisions which demonstrate the point at which the court below strayed in its reasoning. Respondent, like the court below, has lost sight of the alert sounded by this court in *U. S. v. Memphis Cotton Oil Co.*, 288 U. S. 62, 67, where, after discussing the meanings variously impressed upon "cause of action", "right of action", and "remedy", Mr. Justice Cardozo emphasized the necessity for close scrutiny and differentiation to truly identify the aspect of the law in question, especially where such will have a material effect.

Many cases arise where labels are unimportant because misnomers will not substantially affect the result. As a consequence terms are sometimes applied inadvisedly. Respondent has cited a number of such cases concerning the Pennsylvania Wrongful Death Act. But, as discussed in the petition for certiorari, the Pennsylvania Supreme Court has also had to decide cases in which, as here, delineation of the meaning and effect of the Act had to be made, because identification of concept was necessary to reach a decision. There, the Court has consistently held that *the cause of action is the wrongful act or viola-*

tion of a duty, which existed at common law, and was not created or defined by the Pennsylvania statute; and that this statute provided merely for survival of this right to next of kin. Such are cases involving issues of multiplicity of action and res adjudicata,[5] release,[6] survival of action,[7] and conflict of laws,[8] where the differentiation among wrongful act, result and remedy were necessary to a decision.

These conclusions are in accord with the provision of the Constitution of Pennsylvania, Art. 3, Sec. 21, which provides, concerning death actions, only that "in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted."[9] This is purely a survival provision. It recognizes that a right existed without necessity of creation by Pennsylvania, and required only the mechanism of a remedy.

Indeed, *Howard v. Bell Telephone Co.*, 306 Pa. 518, 160 Atl. 613 (1932), cited by respondent, is an excellent example of the necessity for matching term with concept advisedly. There, decedent died twenty-one years after sustaining injury. The question was whether an action for wrongful death, timely after the demise, was barred because decedent had already been barred in his lifetime by the statute of limitation. As did the court below in *Curtis v. Garcia*, the Pennsylvania court made the preliminary statements that "there was no action at common law for . . . death" (p. 520), and that "the Act of 1851 created a new right of action" (p. 521). But, then, the court analyzed the concepts involved and confirmed that "the original right of action" was in the decedent, and the rights of the statutory beneficiaries are "but in succes-

5. *Fisher v. Hill*, 368 Pa. 53, 58, 81 A. (2d) 860 (1951).
6. *Hill v. P. R. R.*, 178 Pa. 223, 228, 230, 35 Atl. 997 (1896).
7. *Hughes v. D. & H. Canal Co.*, 176 Pa. 254, 260, 35 Atl. 190 (1896).
8. *Centojanti v. P. R. R.*, 244 Pa. 255, 261-2, 90 Atl. 558 (1914).
9. Pa. Stat. Ann., Constitution, Art. 3, Sec 21.

sion or substitution", (521-2),[10] that "it must be remembered that the cause of action contemplated by the statute is the tort, the 'unlawful violence or negligence', and not the death caused by the tort." Thus, it is obvious that in first speaking of "action" and "right of action" as cited by respondent, the court really meant "*remedy*", that the cause or right of action discussed in the death statute is the same that decedent had in his lifetime, and that the act provided but a remedy to next-of-kin by permitting the same right to survive the death.

Similarly, in the other cases cited by respondent, the issues involved did not require the court to differentiate between cause of action and remedy as terms of art. For instance, in cases of limitation of action, although the Pennsylvania statutes of limitation are held to be bars to the *remedy*, the courts have often inadvisedly referred to the limitation upon the right of action. For such purposes, as for most, the terminology made no material difference for, although the right might still exist, there being no means of enforcing it, the label became immaterial. The danger, however, is seen in the use made of such decisions. *Fisher v. Hill*, 368 Pa. 53, 58, 81 A. (2d) 860 (1951), highlights this, and demonstrates the inaccuracies in the prior *Pezzulli v. D'Ambrosia*, 344 Pa. 643, 647, 26 A. (2d) 659, 661 (1942), where the court used the term "cause of action" as meaning "remedy" or "power to sue", and not to identify the legal right. Such interchangeable use must periodically be corrected by the court where, as here, the terminology will significantly affect the determination.

Respondent attempts to minimize the meaning and effect of *Fisher v. Hill*.[11] We submit that this case and the others cited by petitioner have disposed of the question in

10. This is in accord with *Just v. Chambers*, 312 U. S. 383, 85 L. Ed. 903; *Cox v. Roth*, 348 U. S. 207, 99 L. Ed. 260.

11. No exception is taken, however, to the other decisions of the Pennsylvania Supreme Court cited by petitioner, which specifically pinpoint the problem and are in accord with Fisher v. Hill.

Pennsylvania, and bring it into line with the opinion of this court as expressed in *Pope & Talbot, Inc. v. Hawn.* Any other result would be in conflict with the Constitution of Pennsylvania, Art. 3, Sec. 21.

Respondent states that "petitioner recovered substantial damages" in the survival action, which were paid. The survival action verdict was $13,000, and the wrongful death verdict was $27,000, after both were decreased by the jury because of contributory negligence (App. below, 11a). This is in line with the fact that the real substance of a death action is the wrongful death claim, and not the survival claim. Thus, although petitioner did recover some damages herein, she was deprived of the substantial part of her losses by reason of the holding of the court below.

The basic principle which controls this matter is the paramount force and authority of the maritime law in all its aspects where it is properly invoked. The decision below limits this principle, in conflict with the decisions of this court and of two other circuits. This court has granted certiorari in one of the latter cases, where the present question is at issue. It is therefore respectfully submitted that a writ of certiorari should be granted, so that the decision of the court below may be reversed, in accordance with law.

Respectfully submitted,

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